Supreme Court, U. S.
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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-182

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
*Petitioner,*

v.

JERSEY CENTRAL POWER & LIGHT CO.; LOCAL UNIONS 327, 749, 1289, 1298, 1303, 1309 AND 1314, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS; OFFICE OF FEDERAL CONTRACT COMPLIANCE; GENERAL SERVICES ADMINISTRATION; NEW JERSEY DIVISION OF CIVIL RIGHTS, DEPARTMENT OF LAW AND PUBLIC SAFETY,
*Respondents.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit**

## BRIEF IN OPPOSITION FOR RESPONDENT UNIONS

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## BRIEF IN OPPOSITION FOR RESPONDENT UNIONS

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The opinions below and the basis of this Court's jurisdiction are accurately set out at pp. 1-2 of the Petition. However, the question presented there does not in fact arise in this case, the statutory materials

reproduced are incomplete and the statement of the case is insufficient to place this matter in proper context. Accordingly, we feel it necessary to restate the materials contained at pp. 2-8 of the Petition.

## COUNTERSTATEMENT OF THE QUESTION PRESENTED

Whether, when there is no proof that a provision in a collective bargaining contract providing for layoff on the basis of plant-wide seniority was designed to disguise discriminatory practices, and no proof of any post-1965 unlawfully discriminatory hiring practices, and the Court of Appeals determines that the collective bargaining contract is consistent with an EEOC conciliation agreement, that Court erred in reversing summary judgment requiring that layoffs be made on a preferential racial basis contrary to the terms of the contract.

## STATUTE INVOLVED

In addition to the provisions of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e, *et seq.* (the "Act"), reproduced at pp. 2-4 of the Petition, § 703(j), 42 U.S.C. 2000e-2(j), is also pertinent. It provides:

> "(j) Nothing contained in this title shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this title to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist, with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area."



## COUNTERSTATEMENT OF THE CASE

Jersey Central Power and Light Company is a public utility which supplies electrical power to consumers in all or part of thirteen counties in the State of New Jersey. For approximately 30 years, the operating, clerical and maintenance employees of the Company have been represented by respondent Local Unions 327, 749, 1289, 1298, 1303, 1309 and 1314, International Brotherhood of Electrical Workers, AFL-CIO (hereinafter, the "Locals" or the "Unions"). Of the Company's total work force of some 3,900 employees, approximately 2,900 are represented by the Unions under a single collective bargaining agreement with the Company. It is uncontroverted that the Company "is solely responsible for hiring" (Appendix to the Petition, hereinafter "Pet. App.", 30, n. 18). Over the years, long predating passage of the Act, the collective bargaining agreements between the Unions and the Company have contained layoff and recall provisions based on company-wide seniority. Layoffs are based on a "last hired, first laid-off" basis, subject only to the ability to perform available work.

Following the filing of charges with EEOC against the Company and the Unions, and a reasonable cause determination that the Company was discriminating against minorities and females with regard to hiring

and certain other employment practices,[1] conciliation meetings were held between EEOC, the Company and the Unions. In January 1974, a written conciliation agreement was entered into by all parties, effective December 3, 1973. The principal provisions of the conciliation agreement, which are set forth at length in the opinion of the court below (Pet. App. 28-30, 43-45), are as follows: (1) a nonadmission provision under which the Commission agreed that the execution of the conciliation agreement did not constitute admission by the Company or Unions of any violation of Title VII; (2) the establishment of an affirmative action hiring program by the Company; (3) a commitment by the Commission not to sue the Company or the Unions over matters covered by the conciliation agreement; and (4) the incorporation within the conciliation agreement of the company-wide seniority system established in the collective bargaining agreement; specifically, it was provided that all conditions of employment, including "the seniority date" of employees hired under the affirmative action program "shall be determined in accordance with the provisions of the Collective Bargaining Agreement." (Pet App. 45)

Between January and July 1974, pursuant to its obligations under the affirmative action provision of the conciliation agreement, the Company hired a number of minority employees who, like all other employees in the bargaining unit, were credited with company-wide seniority from the date of their hire. In July

[1] The only reasonable cause finding against the Unions was that they had allegedly violated Title VII by virtue of being party to a collective bargaining agreement containing a discriminatory maternity benefit provision (Pet. App. 28, n. 16).



1974, because of economic conditions, the Company announced that a layoff of employees would be instituted. It was the Unions' position that such layoff should be conducted under the seniority-layoff provisions of the collective bargaining agreement, *viz,* that the most recently hired employees would be the first to be laid off. The Commission, on the other hand, argued that the Company would violate the provisions of the conciliation agreement and Title VII if it laid off in accordance with the collective bargaining agreement, since the layoffs on that basis would affect the most junior employees including the minority employees recently hired under the Company's affirmative action hiring program.

The Company then brought an action seeking a declaratory judgment concerning its obligations under the conciliation agreement, the collective bargaining agreement and Title VII. Shortly thereafter, the Company commenced its layoffs pursuant to the provisions of the collective bargaining agreement (Pet. App. 34). Two weeks later, while the layoffs were in process, the District Court granted partial summary judgment directing the Company to "deviate" from the company-wide seniority provision of the collective bargaining agreement to lay off more senior white employees to whatever extent was necessary to preserve the same ratio of minority employees as had existed prior to the layoffs (Pet. App. 36). Pursuant to 28 U.S.C. Section 1292(b), an interlocutory appeal was taken to the court below, which stayed the order of the District Court pending appeal, to allow the layoffs to continue under the terms of the collective bargaining agreement, and expedited the appeal. The layoffs were then concluded on the basis of the com-

pany-wide seniority system in the collective bargaining agreement (Pet. App. 36).

On January 30, 1975, the Court of Appeals rendered its decision, reversing the District Court. The Court of Appeals concluded, as a matter of ordinary contract law, that the conciliation agreement was "unambiguous" in requiring that once employees were hired, they would "be controlled by the terms and conditions of employment as set forth in the collective bargaining agreement" (Pet. App. 44). Accordingly, the Court of Appeals "interpret[ed] the conciliation agreement as being consistent with, rather than in conflict with, the collective bargaining agreement, in that it incorporates the Company seniority system" (Pet. App. 45-46).[2] EEOC does not question that holding here (Pet. 7).

The court below then turned "to the question of whether an overriding public policy dictates a modification of the collective bargaining agreement" (Pet. App. 49), specifically, whether a provision requiring the layoff of employees in accordance with a system of company-wide seniority was unlawful under the Act. After a review of the pertinent legislative history and case law under Title VII, the Court of Appeals concluded that on the record here, the District

[2] The Court of Appeals took note, *inter alia*, of the uncontradicted affidavit of Edward Semoneit, President of the Unions' bargaining council, to the effect that EEOC had sought during negotiations for the conciliation agreement a seniority system which would have given minority group and female employees greater seniority than they would actually have had under the collective bargaining agreement, that the Unions opposed the proposal and EEOC withdrew it, and that it was finally agreed that all employees would receive seniority in accordance with the terms of the collective bargaining agreement (Pet. App. 31, n. 20).



Court had erred in entering a summary judgment effecting such a modification. The court below held that a facially neutral company-wide seniority system which was neither designed nor intended to disguise discriminatory practices is a "bona fide" seniority system within the meaning of § 703(h) (Pet. App. 61, 55, n. 54). The Court of Appeals remanded the case with instructions to determine whether the company-wide seniority system in the collective bargaining agreement was *bona fide,* i.e., "neither designed nor intended to disguise discriminatory practices" and then, only if it was not, to take additional evidence "including, but not limited to past discriminatory employment practices." (Pet. App. 55, n. 54.) The Commission's application for rehearing, with a suggestion of rehearing, *en banc,* was denied by the Court of Appeals.

## ARGUMENT

### I

### A. Since There Is No Proof of Post-1965 Unlawfully Discriminatory Hiring Practices, the Question Posed in the Petition Is Not Presented by This Case.

It is patent that the "Question Presented" by the Petition does not arise in this case. There is no evidence, much less a finding, that the Company was guilty of "post-1965 unlawfully discriminatory hiring practices which prevented minority group employees from accruing sufficient seniority to withstand the layoffs" (Cf. Pet. 2).[3] The District Court entered partial summary judgment for the Commission even though there was no proof of post-1965 unlawfully discriminatory hiring

[3] In its efforts to have this case appear to be something different from what it is, the Commission repeats its misstatement of the case throughout its Petition (see pp. 8, 11, 12, 14, 15).

practices; despite the fact that the Commission had entered into a conciliation agreement with the Company and the Union which included a nonadmission clause; and in the face of an affidavit filed by the Commission which stated in pertinent part that the EEOC did "not presently have information as to whether any of the employees who will be laid off or who have already been laid off were the actual victims of past discriminatory practices of plaintiff which the Conciliation Agreement seeks to remedy." (Pet. App. 24, n. 7.)

No amount of legerdemain can overcome the record and turn this into a case involving the question of the proper result to be reached when there is evidence of "post-1965 unlawfully discriminatory hiring practices" against identifiable individuals. Indeed, the Court of Appeals noted that, "we need not, and indeed could not, decide whether any different result would obtain in an action brought by an aggrieved party were the requisite burden of proof sustained . . . . What we decide here can obviously affect and bind only the parties present in this litigation." (Pet. App. 62) In short, the Court of Appeals expressly *refrained* from deciding whether, in the context of a complaint filed by an alleged victim of post-1965 hiring discrimination by the company, and proof of his charge, a layoff of the employee on the basis of company-wide seniority would violate Title VII.

**B. The Instant Case—Arising "In An Unusual Procedural Context" (Pet. App. 21)—Does Not Warrant Review by This Court.**

The Commission's Petition attempts to portray this case as one within the mainstream of Title VII litigation. But, the Court of Appeals was careful to note at the outset of its opinion that this case arises in an "un-



usual procedural context" (Pet. App. 21). First, as just explained, this proceeding is not one in which the District Court entered summary judgment for the defendants even though the Commission had proved "post-1965 unlawful discriminatory hiring practices." On the contrary, summary judgment was entered in favor of the Commission even though there was *no* such proof. Second, while the Commission now attempts to make this a case focusing on Title VII of necessity, it implicates a particular conciliation agreement, which was intended to resolve, *inter alia,* the charge of alleged hiring discrimination by the Company. A primary basis of the decision below therefore, was the proper interpretation of that agreement "according to the principles of general contract law" (Pet. App. 41). The threshold issue in the District Court and the Court of Appeals was whether there was a conflict between the conciliation agreement and the collective bargaining agreement. The Court of Appeals decided that there was no such conflict, and the Commission does not even contest that holding in this Court.

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For both of the above-stated Reasons, this case does not present an appropriate vehicle for determining the question stated in the petition.

**II**

**THE DECISION BELOW IS CLEARLY CORRECT AND IS IN ACCORD WITH THE DECISIONS OF THE OTHER COURTS OF APPEALS WHICH HAVE RULED ON THE ISSUE ACTUALLY PRESENTED BY THIS CASE.**

The decision of the court below, finding no violation of Title VII based on layoffs pursuant to a company-wide seniority system, where no post-1965 hiring discrimination was shown, is in accord with those of the

only other courts of appeals to rule on that issue. *Waters* v. *Wisconsin Steel Works,* 502 F.2d 1309 (7th Cir., 1974), petitions for certiorari pending, Nos. 74-1064, 74-1350; *Watkins* v. *United Steelworkers of America, Local No. 2369,* 516 F.2d 41 (5th Cir., 1975). Both the Fifth and Seventh Circuits held that Title VII does not authorize remedies for those who have not suffered discrimination under Title VII. Both have correctly drawn the line between "make whole" remedies which are required under Title VII to remedy discrimination against specific individuals (*Albemarle Paper Company* v. *Moody,* 43 L.W. 4880 (June 25, 1975)), and "preferential" remedies which would grant fictional seniority to individuals not discriminated against under Title VII. Thus, all three decisions rest on this Court's teaching in *Griggs* v. *Duke Power Company,* 401 U.S. 424, 431 (1971), that "Discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed." And, as the painstaking analysis of the court below demonstrates (see Pet. App. 56-58), the instant decision, along with *Watkins* and *Waters,* clearly reflects the congressional intent underlying §§ 703(h) and (j) as stated in the Act itself and its legislative history.

Accordingly, as the Fifth Circuit concluded in its recent *Watkins* decision:

> "We hold that, regardless of an earlier history of employment discrimination, when present hiring practices are non-discriminatory and have been for over ten years, an employer's use of a long-established seniority system for determining who will be laid-off, and will be be rehired, adopted without intent to discriminate, is not a violation of Title VII or Section 1981, even though the use of the seniority system results in the discharge of more blacks than whites to the point of eliminating blacks from the work force, where the individual employees who suffer layoff under the system have not themselves been the subject of prior employment discrimination." 516 F.2d at 44-45.



The Commission seeks to distinguish the Fifth Circuit's decision in *Watkins* because no post-Act discrimination was shown there. However, there was no finding of post-Act discrimination in this case either. Moreover, the Fifth Circuit was clearly of the view that it had reached the same result on the same issue as the Third Circuit in the instant case (516 F.2d at 45.) Similarly, the Commission attempts to distinguish the Seventh Circuit's decision in *Waters* on the basis that the discrimination found there existed prior to passage of the Act. We again note only that there is no finding of any discrimination in this case, either before or after passage of the Act. Finally, the Commission states that the Fifth Circuit's decision in *Franks* v. *Bowman Transportation Company,* 495 F.2d 398 (5th Cir., 1974), *certiorari granted,* No. 74-728, is not in point. We agree that the issue in *Franks* is wholly different from that in the instant case. Indeed, the difference is significant, as *Franks,* unlike the case at bar, presents the sole issue of the scope of the remedy necessary to make whole an identifiable victim of post-Act hiring discrimination.

In sum, the Courts of Appeals which have faced the issue actually presented by this case have unanimously rejected the preferential approach urged by EEOC. Moreover, because of the context in which this case arises, *supra,* it does not represent an appropriate vehicle for review of even that issue.

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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